

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.)	
W. A. DREW EDMONDSON, in his capacity as)	
ATTORNEY GENERAL OF THE STATE OF)	
OKLAHOMA and OKLAHOMA SECRETARY)	
OF THE ENVIRONMENT C. MILES TOLBERT,)	
in his capacity as the TRUSTEE FOR NATURAL)	
RESOURCES FOR THE STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	05-CV-0329 JOE-SAJ
)	
TYSON FOODS, INC., TYSON POULTRY, INC.,)	
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)	
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)	
CAL-MAINE FARMS, INC., CARGILL, INC.,)	
CARGILL TURKEY PRODUCTION, LLC,)	
GEORGE-S, INC., GEORGE-S FARMS, INC.,)	
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)	
and WILLOW BROOK FOODS, INC.,)	
)	
Defendants.)	
)	
TYSON FOODS, INC., TYSON POULTRY, INC.,)	
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)	
GEORGE-S, INC., GEORGE-S FARMS, INC.,)	
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)	
and WILLOW BROOK FOODS, INC.,)	
)	
Third Party Plaintiffs,)	
)	
vs.)	
)	
City of Tahlequah, <i>et al.</i>,)	
)	
Third Party Defendants.)	

**DEFENDANT/THIRD PARTY PLAINTIFFS' MOTION
TO TOLL RUNNING OF TIME TO SERVE PROCESS UPON
THIRD PARTY DEFENDANTS PENDING DISPOSITION
OF DEFENDANTS' MOTION TO STAY [DOCKET NO. 125]**

Defendant/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., (hereinafter "Third Party Plaintiffs") hereby move for the entry of an order tolling the running of the time period prescribed by Fed. R. Civ. 4(m) for service of process on the Third Party Defendants identified in their Third Party Complaint filed on October 4, 2005 (Docket No. 80).¹ Third Party Plaintiffs bring this Motion pursuant to Fed. R. Civ. P. 6(b), and request that the period of tolling continue until the Court rules upon Defendants' Motion to Stay Proceedings (Docket No. 125), which is now at issue. Counsel for the Third Party Plaintiffs has conferred with Plaintiffs' counsel, Mr. Riggs, and has been advised that Plaintiffs object to the requested relief. In support of their Motion, Third Party Plaintiffs will show the Court:

1. On November 14, 2005, Defendants filed their Motion to Stay Proceedings and Integrated Brief in Support ("Motion to Stay"). Defendants' Motion to Stay was filed in light of the Motion for Leave to File Bill of Complaint and Bill of Compliant filed on November 3, 2005 by the Arkansas Attorney General in the United

¹ The list of Third Party Defendants includes individuals, trusts, partnerships, corporations and other business incarnations, and also includes three public bodies subject to the provisions of Oklahoma's Governmental Tort Claims Act, 51, O.S. §§ 151, *et. seq.* ("GTCA"). Defendants requested as part of their Motion to Stay Proceedings that the Court suspend the running of the time period for serving these entities under the GTCA while the proceedings are stayed. (Docket No. 125, at 5 n. 5.) To avoid any question as to whether the Court has the power to suspend the running of the 180-day time limit for commencing an action against a political subdivision set forth in 51 O.S. § 157(B) as to those political subdivisions which can be served with process pursuant to 51 O.S. § 157(A), the Third Party Plaintiffs advise the Court that they intend to proceed with serving process on these entities, notwithstanding their request in the instant Motion that the Court toll the running of the service deadline as to the remaining 253 private Third Party Defendants.

States Supreme Court in the case styled, *State of Arkansas v. State of Oklahoma*, No. 220133 (Original 2005) [the “Supreme Court action”]. As the Motion to Stay sets forth in detail, the Arkansas Attorney General is pursuing an injunction in the Supreme Court, which would prevent the prosecution of the State of Oklahoma’s pollution-based claims in the lawsuit before this Court. Given that the Supreme Court’s disposition of Arkansas’ claims could moot or invalidate further substantive proceedings in this lawsuit, the Defendants have requested that the Court stay the proceedings, and respectfully suggest that their Motion to Stay should be the first matter taken up and decided by the Court prior to ruling on any of the other dispositive and procedural motions currently before it.

2. Third Party Plaintiffs filed their Third Party Complaint on October 4, 2005 (Docket No. 80), setting forth their claims against 256 individuals and entities. Based upon the allegations and theories advanced by the Plaintiffs in their First Amended Complaint, the Third Party Plaintiffs assert that if they are liable to the Plaintiffs for any alleged natural resource injuries within the Illinois River Watershed (which is denied), then the Third Party Defendants should be held similarly liable based upon their operations and conduct, which has the same effect or potential to effect the Illinois River Watershed as those alleged against the Defendants.

3. Fed. R. Civ. P. 4(m) dictates that the Third Party Defendants must be served by **February 1, 2006**. Third Party Plaintiffs seek the instant relief to avoid expanding the lawsuit to include these Third Party Defendants until such time as the Court rules upon the Defendants’ Motion to Stay, thereby determining that either: (1) the proceedings in the lawsuit should be stayed pending the outcome of the Supreme Court

action, and therefore, the Third Party Defendants need not be served with process until such time as the Court's stay is lifted; or (2) the lawsuit should not be stayed, and therefore, the litigation should proceed including the assertion of jurisdiction over the Third Party Defendants.

4. Unless the Court sustains the Third Party Plaintiffs' Motion, thereby tolling the running of the 120-day limit for serving process, the timing is such that the Third Party Plaintiffs will need to commence serving these third parties **by no later than mid-January 2006**. The Court has the discretion under Rules 4(m) and 6(b) to enter an order tolling the running of this time period under these circumstances, and the Third Party Plaintiffs submit that it is in the best interest of justice to do so.

ARGUMENTS AND AUTHORITIES

Third Party Plaintiffs' Motion to toll the running of the 120-day limit for service of process upon the Third Party Defendants is proposed as a reasonable case management tool to permit the Court to take up and decide the important issues raised by the Defendants' Motion to Stay, while delaying the service of process upon 253 individuals and entities, who will otherwise be compelled to retain counsel and then answer or otherwise plead in response to the Third Party Complaint. Granting the requested relief will not materially delay the progress of the lawsuit, as the Third Party Plaintiffs can move forward to serve the Third Party Defendants if the Court overrules the Defendants' Motion to Stay. Regardless of how the Court rules on the Motion to Stay, sustaining the instant Motion will serve the interests of justice. If the Court sustains the Motion to Stay, it will have saved these additional parties the expense of counsel and the resources of the Court consumed with their responsive pleadings. If the Court overrules the Motion to

Stay, suspending the requirement of service on these Third Party Defendants, it will have abated the consumption of these resources until it became absolutely necessary.

It is within the Court's discretion to enter an order extending or modifying the 120-day time limit for service under the Federal Rules. Fed. R. Civ. P. 6(b) and 4(m); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995) (discussing the trial court's discretion and noting the abuse of this discretion standard of review); *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (recognizing that a motion under Rule 6(b) is the proper mechanism for seeking relief from the 120-day time limit). Although relief from the time limit imposed by Rule 4(m) is generally premised on a movant's proof of "good cause," the 1993 amendments to the Rule broadened the trial court's discretion to permit extensions of the 120-day limit even when good cause is not shown. *Henderson v. United States*, 517 U.S. 654, 662 (1996) (citing the 1993 Advisory Committee's Notes on Fed. R. Civ. P. 4, 28 U.S.C.App., p. 654); *Espinoza*, 52 F.3d at 840-41 (same); *Hunsinger v. Gateway Management Associates*, 169 F.R.D. 152, 154 (D. Kansas 1996) (same). The *Espinoza* court held that within the Tenth Circuit, trial courts should make a preliminary evaluation of whether the movant has shown good cause for extending the time for service. *Espinoza*, 52 F.3d at 841. If the showing is made, the movant is entitled to a mandatory extension of time. *Id.* Failing a showing of good cause, the court should nonetheless proceed to consider "whether a permissive extension of time is warranted." *Id.*

Under the current procedural posture of this action, good cause exists to support the Third Parties' request to toll the running of the time limit for service. Justification for the tolling is provided by the Defendant's Motion to Stay, which is now at issue before

the Court. The Motion to Stay requests that the Court consider the Arkansas Attorney General's Motion to File Bill of Complaint and Bill of Complaint now before the United States Supreme Court and recognize that a number of dispositive legal issues that are now pending before this Court by virtue of the Defendants' Motions to Dismiss are among the same issues that may be decided by the Supreme Court should it agree with Arkansas' request for the assumption of original jurisdiction.² In particular, the Defendants suggest that staying the proceedings in this action is appropriate and prudent given Arkansas' request for an injunction from the Supreme Court to halt this litigation. (Docket No. 125 at 2, 6.) As previously discussed, good cause for tolling service also derives from the benefit to the Third Party Defendants and the Court by abating the necessity to appear and plead in response to the Third Party Complaint until such time as the Court deems it necessary.

The Court is also justified in tolling the time for service as a pure function of efficient case management.³ Should the Court determine that the Defendants' Motion to Stay is not well taken, the delay in bringing all of the parties within the jurisdiction of the Court to allow the litigation to proceed will be minimal, thus no prejudice to the Plaintiffs

² Tyson Poultry, Inc.'s *Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint* (Docket No. 64), Tyson Chicken, Inc.'s *Motion to Dismiss Counts 4, 5, 6, and 10 of the First Amended Complaint Under the Political Question Doctrine* (Docket No. 65), Tyson Foods, Inc.'s *Motion to Dismiss Counts 4-10 of the First Amended Complaint* (Docket No. 66), Cobb-Vantress, Inc.'s *Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint* (Docket No. 67), and Peterson Farms, Inc.'s *Motion to Dismiss* (Docket No. 75).

³ Courts have recognized that tolling the time period for service of process is the proper mechanism for dealing with preliminary matters the disposition of which would affect the further progress of the action. *See Lowery v. Carrier Corp.*, 953 F. Supp. 151, (E.D. Texas 1997) (tolling the service period during the time that a motion to proceed *in forma pauperis* was pending).

will accrue. Likewise, the Third Party Defendants would not be prejudiced by the delay in service, as it postpones their need to retain counsel and the onset of litigation expenses until such time as it is absolutely necessary.

Third Party Plaintiffs placed this matter before the Court as soon as it became apparent that they may be required to commence service on the Third Party Defendants prior to the time the Court disposes of the Motion to Stay. The courts have recognized that motions to extend the service deadline offered prior to the expiration of the deadline are to be “liberally permitted.” *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987). Accordingly, whether analyzed under the “good cause” standard or under the discretionary permissive standard, the Court’s decision to toll the time for service of process is prudent and justified.

CONCLUSION

Third Party Plaintiffs respectfully submit that it is in the interests of justice and the management of this action to toll the running of the 120-day time limit for service of the Third Party Complaint until such time as the Court rules upon Defendants’ Motion to Stay, and therefore, they request that the Court enter its order granting the requested relief.

Respectfully submitted,

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